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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

Number.....

R. P. BALKCOM, JR., as Warden of the Georgia State Prison,
*Petitioner,*

v.

PHIL WHITUS and LEON DAVIS,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

R. P. Balkcom, Jr., as Warden of the Georgia State Prison, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 18, 1964.

## CITATIONS TO OPINIONS BELOW

The opinion of the Georgia Supreme Court on appeal in *Whitus*, printed in Appendix A hereto, *infra*, p. 12, is reported in 216 Ga. 284, 116 S.E. 2d 205. The opinion of the Georgia Supreme Court on appeal in *Davis*, printed in Appendix A hereto, *infra*, p. 17, is reported in 216 Ga. 110, 114 S.E. 2d 877. Denial of certiorari to the United States Supreme Court in *Whitus*, printed in Appendix A, hereto, *infra*, p. 20, is reported in 365 U.S. 831, 81 S. Ct. 718, 5 L. ed 2d 708. The final judgment of the District Court on petition for writ of habeas corpus in *Whitus* (R. 70) is unreported and is printed in Appendix A hereto, *infra*, p. 26. The opinion of the Circuit Court of Appeals affirming the dismissal, printed in Appendix A hereto, *infra*, p. 26, is reported in 299 F. 2d 844 (5th Cir., 1962). The *per curiam* decision of the United States Supreme Court, vacating the judgment and remanding the case (R. 93), printed in Appendix A hereto, *infra*, p. 27, is reported in 370 U.S. 728, 82 S. Ct. 1575, 8 L. ed 2d 803. The final order and judgment of the District Court in *Whitus* (R. 95-100), is unreported and is printed in Appendix A hereto, *infra*, p. 27. The final order and judgment of the District Court in *Davis* (R. 181-185) is unreported and is printed in Appendix A hereto, *infra*, p. 34. The opinion and judgment of the Circuit Court of Appeals in the consolidated cases of *Whitus* and *Davis* (R. 200-233), printed in Appendix B hereto, *infra*, p. 39, is reported in 333 F. 2d 496 (5th Cir., 1964).

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 18, 1964.

The petition is timely brought[1] and jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## QUESTION PRESENTED

1. WHETHER AN INDIVIDUAL CAN PURPOSELY AVOID RAISING A KNOWN CONSTITUTIONAL ISSUE IN EITHER THE STATE TRIAL COURT OR APPELLATE COURT AND NEVERTHELESS SUCCESSFULLY SEEK RELEASE ON FEDERAL HABEAS CORPUS ON THIS GROUND WHEN STATE PROCEDURE REQUIRES THAT HE RAISE IT AT TRIAL?

## STATUTE INVOLVED

28 U.S.C. § 1254 (1):

"Cases in the courts of appeals must be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

## STATEMENT

The respondents, Leon Davis and Phil Whitus, were convicted of the crime of murder in the Superior Court of Mitchell County, Georgia, and received the death penalty.

The names of thirty (30) Negroes were on the jury list but there was uncontradicted testimony that Negroes

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[1] 28 U.S.C. § 2101 (c); *United States* v. *Hayman*, 342 U.S. 205, 209, H. 4; *McGann* v. *United States*, 352 U.S. 904; *Heflin* v. *United States*, 358 U.S. 415, 418, H. 7.

had never served on either the grand or petit juries of Mitchell County and there were no Negroes on the jury impaneled to try the respondents.

Mr. P. Walter Jones, attorney for Phil Whitus, has represented the respondent throughout the long history of this case in a most energetic and unselfish manner. Mr. Jones testified in the District Court that he and counsel for Leon Davis, Mr. Peacock, discussed the existence of systematic exclusion of Negroes from the jury but decided to "waive" any objection on that ground and take their chances with the jury as then composed as they believed they had a chance for acquittal and preferred not to risk arousing community hostility by raising this admittedly sensitive issue (R. 52-61).

It is likewise evident from the record that the defendants were men of lesser intelligence and were completely dependent upon their attorneys for a proper defense. (R. 157-158).

The question of systematic exclusion of Negroes was not introduced on appeal to the Supreme Court of Georgia or in the motion for new trial. It was introduced for the first time in a cursory manner in the petition for certiorari to the United States Supreme Court, which petition was denied.

**Federal Proceedings and Jurisdiction**

On March 18, 1961, counsel for Phil Whitus filed a petition for writ of habeas corpus in the District Court for the Southern District of Georgia (R. 5-7). The jurisdiction of said Court was founded on 28 U.S.C. §§ 2241, 2251 (R. 175).

On April 14, 1961, after a full hearing, Judge Frank L. Scarlett rendered an order dismissing the writ on the grounds that the petitioner had not exhausted his State remedies; that the petitioner had failed to substantiate his contention of systematic exclusion of Negroes from the jury; and that the issue of systematic exclusion of Negroes from the jury had been waived by the failure of counsel to raise it at trial (R. 70-73).

The judgment of the District Court was affirmed on appeal to the Fifth Circuit Court of Appeals, said decision being based on the failure of the defendant to exhaust his State remedies. The respondent petitioned for a writ of certiorari in the United States Supreme Court on June 25, 1962, and this Court vacated the judgment of the Court of Appeals and remanded to the District Court for a hearing on the merits (R. 92).

After a full hearing in the United States District Court for the Southern District of Georgia, Judge Frank L. Scarlett, on May 24, 1963, again dismissed the petition upon finding: (1) that the evidence was sufficient to support the conviction; (2) there was no evidence to support the contention that there was discrimination in the selection of the jury; (3) that there was no violation of the petitioner's right to equal protection or due process (R. 98, 99).

The respondents next obtained review in the Fifth Circuit Court of Appeals, which, on June 18, 1964, reversed the judgment of the District Court upon a finding that there was no waiver of the constitutional issues regardless of a reasonable State procedural rule to the contrary and in spite of the necessary finding that respond-

ents' counsel knew of the constitutional right and possible violation thereof, and elected not to raise it.

It is from this adverse judgment that petitioner seeks review by writ of certiorari.

## REASONS FOR GRANTING THE WRIT

The present case is concerned with the fundamental concepts of "waiver" and "adequate and independent state grounds for decision."

Although the petitioner does not question the holding of this Court in *Fay* v. *Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. ed 2d 837, that "adequate and independent state grounds for decision" no longer arbitrarily bar federal review on habeas corpus, we do subinit that the rule is disruptive of State criminal procedure and the very essence of state-federal division of responsibility when applied to all State procedural requirements without regard to their overall fairness.

The federal courts consistently expressed concern over the "circumstances" of each case as presenting exceptions to the general rule prior to *Fay* and the petitioner would urge that the Court be no less concerned over "circumstances" mitigating against the application of the general rule established in *Fay*.

If the appellate courts of this State were unwilling to uphold the respondents' right to a constitutionally constituted jury, the Circuit Court's ruling that "the core of this case is the lack of remedy in the state courts"[1] would be valid as it could justifiably be said that failure to follow meaningless procedural requirements would

[1] 333 F 2d 498.

not bar federal review. However, the Georgia appellate courts have proven their good faith by actively prohibiting the systematic exclusion of Negroes from juries when the issue is presented to them in a proper manner. *Crumb* v. *State,* 205 Ga. 547, 54 S.E. 2d 639 (1949); *Glass* v. *State,* 219 Ga. 565, 134 S.E. 2d 813 (1964); *Glass* v. *State,* 109 Ga. App. 353; *Ludden* v. *State,* 109 Ga. App. 745, 137 S.E. 2d 402 (1964). The recent Georgia case of *Allen* v. *State,* 110 Ga. App. ..... (July 7, 1964; No. 40728), extended the right to challenge jury composition on this ground to white defendants as well as Negroes, thereby exhibiting the Court's abhorence of any selection which does not represent an unbiased cross-section of the community.

In return for the assurance that an individual's rights will be protected, the Georgia courts require only that the issue be raised before the commencement of the trial. *Cornelious* v. *Georgia,* 193 Ga. 26, 17 S.E. 2d 156 (1941); *Lumpkin* v. *Georgia,* 152 Ga. 229, 109 S.E. 664 (1921); *Wilcoxon* v. *Aldridge,* 192 Ga. 634, 15 S.E. 2d 873 (1941). The decision of the Court of Appeals does only that which would have been done by the State courts had the issue been presented to them, namely, remand the case for retrial. The State courts are vested with concurrent responsibility for upholding the Constitution of the United States and when they exhibit their willingness to accept this responsibility, are they still to be intentionally by-passed and tacitly declared unworthy of defending individual liberty?

The facts show that the respondents, Phil Whitus and Leon Davis, were represented by counsel at their trial. Their attorneys were white, but the Circuit Court which

has expressed criticism of southern white counsel's representation of Negroes[2] recognized that these attorneys have continuously kept their clients' interests foremost in their minds and have represented them to the best of their ability. *Whitus and Davis* v. *Balkcom, Jr., Warden,* 333 F. 2d 496, 503 (5th Cir., 1964).

It was elicited in the District Court that the respondents' attorneys were aware that Negroes had never served on the grand or petit juries in Mitchell County and that this was grounds for objection. However, they believed that they could obtain a verdict of acquittal without raising this admittedly sensitive issue. Respondents were found guilty. Respondents' counsel then sought new trials; appealed to the Supreme Court of Georgia; and petitioned for writ of certiorari in the United States Supreme Court, all without success and all without raising the constitutional issue. After denial of the petition for certiorari, counsel filed petitions for writs of habeas corpus in the Federal District Court where they raised the constitutional issue for the first time.

There was no ignorance of the facts attendant upon the case as was found crucial in *United States ex rel. Seals* v. *Wiman,* 304 F. 2d 53 (5th Cir., 1962). Also, the waiver was not one dictated by moral weakness of the attorneys but one based on the honest belief that their clients would be acquitted.

In *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019 (1938), this Court defined waiver as "an *intentional* relinquishment or abandonment of a known right or privilege." In discussing waiver in *Fay* v. *Noia, supra,*

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[2] *United States ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71, 82 (5th Cir., 1959).

this Court further defined waiver as "understandingly and knowingly fore[going] the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or *any other reason* that can fairly be described as the *deliberate by-passing of state procedures. . . .*"[3] The petitioner maintains that the facts of the present case conclusively show an "intentional relinquishment" and a "deliberate by-passing," the standards established by this Court for an effective waiver.

The petitioner submits that the Circuit Court's holding that the respondents' choice on waiver must be between two "meaningful" alternatives is clearly without support in the law and contrary to established rules which hold that relinquishment of a right "for any reason," constitutes waiver. A waiver is necessary only when an attorney feels that his client would be jeopardized in some way by counsel's insistence upon strict enforcement of all legal rights. The reasons for waiving rights are varied and the petitioner submits that it is not the function of the courts to balance the alternatives to determine whether they are "meaningful." This has historically been left to the judgment of trial counsel.

There was no consultation between attorney and client but the Circuit Court apparently recognized that under the circumstances, this was not required. *Whitus* v. *Balkcom, supra.* The opinion of the Court is unclear on this point, but the only alternative to such a holding would be a ruling that non-assertion of rights never constitutes waiver where the client lacks the intelligence to participate in the decision.

The petitioner further submits that the unrestrained

[3] 372 U.S. 391, 83 S. Ct. 822, 9 L. ed 2d 837 (1963).

brandishing of the terms "fundamental rights" and "extraordinary case" has reached the point of contradiction and should be examined. In the present case, the Circuit Court recognized that the non-assertion of the right to be tried by jury and the right to counsel may constitute waiver, but apparently found that the instant case involved such "fundamental rights" and was of such an "extraordinary nature" that the non-assertion rule was inapplicable. The petitioner submits that the right to trial by a jury of ones peers is not more fundamental than the right to trial by jury.

If this Court does not recognize a valid waiver in the present case, the doors are opened to unending litigation in criminal cases. An attorney representing a Negro defendant would be entirely free to withhold constitutional objections to the pre-trial and trial proceedings and seek an acquittal. If unsuccessful in his defense, he could then proceed to the appellate courts of the State seeking a reversal only on the merits. If he were again unsuccessful, he could begin an entirely new case in the federal courts, raising the constitutional issues for the first time. In the final analysis, there would be two separate and distinct series of litigation, thereby prolonging the final disposition of cases for many years. The petitioner is unaware of any constitutional or statutory authority which gives the federal courts original exclusive jurisdiction of constitutional issues under facts similar to those in the present case.

The petitioner submits that the Circuit Court's decision is contrary to all established rules concerning waiver and is a distortion of the rule established by this Court in *Fay* v. *Noia* regarding adequate and independent state

grounds for decision and should be reversed by this Court after full hearing.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE COOK,
The Attorney General

PEYTON S. HAWES, JR.,
Assistant Attorney General

ALBERT SIDNEY JOHNSON,
Assistant Attorney General

FRED HAND, JR.,
Solicitor-General
Albany Judicial Circuit

September 11, 1964.

## APPENDIX "A"

## JUDGMENT OF THE SUPREME COURT OF GEORGIA IN *WHITUS*

The evidence fully supports the verdict of the jury that the defendant voluntarily was present, participating, aiding and abetting in the killing of the deceased, and was guilty of murder as a principal in the second degree.

ARGUED MAY 9, 1960 — DECIDED SEPTEMBER 12, 1960 — REHEARING DENIED SEPTEMBER 21 AND OCTOBER 6, 1960.

Murder. Mitchell Superior Court. Before Judge Crow. March 1, 1960.

ALMAND, Justice. Phil Whitus, under an indictment charging him and three others with murder by shooting James E. Glenn to death with a pistol, was on his trial before the court and a jury found guilty and sentenced to death by electrocution. His motion for a new trial on the general and special grounds being denied, he seeks by this writ of error a review of the order denying a new trial.

The defendant relies here solely on the general grounds of his motion for new trial, the contention being that the evidence conclusively shows that the deceased was shot and killed by the codefendant, Leon Davis, and that all the evidence shows that, though this defendant was present, aiding and abetting Davis in the killing of Glenn, he could not be found guilty as a principal in the second degree because the evidence demanded a finding that his participation in the crime was not voluntary,

but as the result of fear from threats and menaces directed at him by Davis and, therefore, under the provisions of *Code* § 26-402, his conviction was unauthorized.

Counsel for the State rightly concedes that the evidence shows that Davis was the actual perpetrator of the offense. It appears without contradiction that this defendant was present, aiding and abetting Davis in the killing of Glenn. The court gave in charge to the jury *Code* § 26-402, and instructed them that, even if the jury found that the defendant had aided, abetted, or assisted in the killing of Glenn, but that his participation was through fear as the result of threats and menaces of immediate danger to his life or any member, they would not be authorized to convict him. The sole question for decision is: Does the evidence authorize the finding of the jury that the defendant's participation in the killing was voluntary?

A brief summary of the evidence, consisting of the defendant's written statement and the testimony of Daniels, a codefendant, as to the defendant's participation in the killing is as follows: Shortly after midnight on November 15, 1959, James E. Glenn left his home to investigate a disturbance by cursing and loud talking on the public road in front of his house. He found the four defendants. The automobile which Davis had been driving was in a ditch. All of the defendants had been drinking intoxicants. The defendant Whitus knew Glenn and asked him to help them get the car out of the ditch. Glenn said he would, and went to his home, got his .22 calibre pistol, and returned to the scene with his automobile where he discovered that the defendants had succeeded in getting the car onto the road. He, Glenn, fol-

lowed them down the road, and when he caught up with them, Davis suddenly braked his automobile, causing the front of Glenn's car to strike the rear of the car driven by Davis. The defendants then drove a short distance to the home of Leon Davis with Glenn still following them at a distance. While the other defendants went to the backyard of Davis' house, Davis procured his rifle from the house and went down the road to meet Glenn. Shortly thereafter, Davis returned to the yard with his rifle under his arm and Glenn's pistol in his hand, and fired two shots in the direction of the other defendants and called them to come with him. They joined Davis, and all of them went to the road where they found Glenn's car in a ditch. Glenn asked the defendants to help him get his car out of the ditch and back to his home. Davis returned Glenn's pistol to him. After more conversation about removing Glenn's car from the ditch, Davis cursed Glenn and hit him on his head with the rifle barrel. Davis then took Glenn's pistol again. At the direction of Davis the other defendants put Glenn, who was unconscious, in his car. The defendants then got in Davis' car and drove about four miles. Davis then said: "We are in this thing together and we just as well do it right." Davis asked the defendant what he would do: "Would you leave him in front of your house or get him out in the front of your house?" The defendant replied: "I wouldn't leave him in front of my house. I'd get him out from in front of my house." Davis then said: "I'm going back and kill the son of a bitch now to keep him from talking, cause if he talks he could have all four of us hanged and he'll be walking around here a free man." All of the defendants with Davis driving returned to the Glenn car where they found Glenn in the

car and still unconscious. Davis with Glenn's pistol in his hand directed the defendant to get in his car and push the Glenn car, which Davis would steer, to a point where Davis would signal with his hand. The Glenn car was pushed about four miles and then off the road in a wooded area where no one lived. Davis, with the pistol in his hand, ordered the defendants to race the motor while he fired the shots. Davis went back to the Glenn car and fired one shot into Glenn's head. Glenn's body fell out of the car and Davis fired three more shots into Glenn's head. All of the defendants got into Davis' car, the defendant, Whitus, remarking: "Now we can go home like nothing ain't happened." All of the defendants went to the back of Whitus' house where they had hid their liquor and all except Daniels drank the liquor.

"A person who aids and assists in the commission of a crime or in measures taken to conceal it and protect the criminal, is not relieved from criminality as an accomplice on account of fear excited by threats or menaces, unless the danger be to life or member, nor unless that danger be present and immediate as above announced touching fear under the influence of which perjury is committed." *Burns* v. *State*, 89 Ga. 527 (7) (15 S. E. 748). The evidence in this case as to the defendant's participation in the commission of the crime and efforts to conceal it does not warrant the conclusion that his participation was because of threats or menaces, which put the defendant under fear of immediate danger of his life or a member. The statement, which the defendant made, as testified to by Daniels, the codefendant, after aiding Davis in the brutal killing and concealment of the crime, that "Now we can go home like nothing ain't

happened," sounds more like one who was self-satisfied with a job well done than one who was acting under the menacing and threatening domination of another. Under the evidence the jury was authorized to find that the defendant's participation in the crime was voluntary, and that he was guilty of murder as a principal in the second degree.

The evidence supports the verdict, and it was not error to deny the defendant's motion for a new trial.

*Judgment affirmed. All the Justices concur, except Duckworth, C. J., Head, P. J., and Quillian, J., who dissent.*

DUCKWORTH, Chief Justice, dissenting. In full recognition of the established rule of law that holds those parties to a criminal conspiracy or enterprise, who commit no overt act, equally guilty with those who commit the overt acts, I am, nevertheless, simply unable to find any basis either in law or common reason for holding this defendant guilty of murder where all the evidence excludes any possibility of conspiracy among the four, who included this defendant and the person who did the killing. They had planned no robbery, theft or other crime, and indeed had no reason to expect to see the deceased before he went to them. Thereafter, this defendant had no dealings, words or feelings with or toward the deceased. Why should he want to harm the deceased? There is positively a complete absence of even a suspicion of any motive. The slayer committed every criminal act that caused the death. He needed no help from this accused other than pushing the car and racing the motor, both of which were done at his command while he held the gun with which he later shot the deceased who had

already been knocked unconscious by the killer. To say that this was not enough to cause a reasonable person to fear that a refusal to obey would endanger his life, is to ignore realities and human nature. No act of his harmed a hair of the deceased. Even if he was cowardly and foolish in obeying the murderer, who held a gun, this would not show his guilt of criminal desire or intent. Human life should not be taken by the State with such total lack of evidence of either act or intent as this record shows. Unless he is saved by the clemency of the Pardon and Parole Board, his life will be forfeited for a crime he never committed and had no cause for wanting it committed. If this decision fixes the law, then every person stands in danger of being electrocuted if a murder is committed by someone of his associates even though he had no knowledge that it was going to be done.

## JUDGMENT OF THE SUPREME COURT OF GEORGIA IN *DAVIS*

1. Where the State makes a prima facie case that a written statement to the arresting officer was freely and voluntarily made by the defendant, it is not error to admit such statement in evidence over the objection that, "the proper foundation has not been laid."

2. The failure of the court to give in charge the provisions of the act of 1952 (Ga. L. 1952, p. 205; Code, Ann., § 27-1503) was not error.

3. The verdict is fully supported by the evidence.

ARGUED MAY 9, 1960 — DECIDED JUNE 9, 1960.

Murder. Mitchell Superior Court. Before Judge Crow. March 12, 1960.

ALMAND, Justice. Leon Davis, under an indictment charging him and three others with the murder of James E. Glenn, by shooting him to death with a pistol, was on his trial before the court and a jury, found guilty and sentenced to death by electrocution. His motion for new trial on the general grounds and two special grounds was denied. His bill of exceptions assigns error on the denial of his motion.

1. The first special ground assigns error on the admission in evidence of the alleged written confession of the defendant over the objection that "the proper foundation has not been laid." The defendant asserts that its admission was "extremely harmful and prejudicial to movant."

The brief of evidence discloses that the defendant, shortly after his arrest, made a written statement to the arresting officer, and that such statement was freely and voluntarily made without being induced by any offer of benefit or fear of injury. This was sufficient to make a prima facie case for the admission of the statement in evidence. *Booker* v. *State,* 210 Ga. 34 (2) (77 S. E. 2d 505).

2. The second special ground assigns error on the failure to give in charge to the jury the provision of the act of 1952 (Ga. L. 1952, p. 205; Code, Ann., § 27-1503). This statute in substance provides that, when an accused "shall contend that he was insane or mentally incompetent under the law at the time the act or acts charged against him were committed," the trial judge shall instruct the jury that, in case of acquittal on such contention, the jury shall specify in their verdict that the accused was acquitted because of mental irresponsibility or insanity at the time of the commission of the act. This

ground asserts that "movant introduced evidence that he was insane at the time of the homicide and that he was mentally incompetent under the laws at the time of the homicide charged against him," and that it was prejudicial error not to give in charge this statute. The brief of evidence does not support this contention. The defendant did not introduce any evidence. In his statement to the jury the defendant said: "I never did do no prowling around and every time I take a drink or two it runs away with me. It gets started in my head and I can't manage it, but after it's over with, I can see things clearly after it's over with. . . . I didn't know where I was going. I had loosed my mind and I didn't know where I was going. . . . Well, I didn't see nothing wrong with it then, which I know it's wrong now, but I didn't see it then. I was drinking at that time and I ain't drinking now." These excerpts are the only parts of his statement that have any relation, far or near, to the defendant's mental condition at the time of the commission of the offense. They are wholly insufficient to amount to a contention that he was insane or mentally incompetent at the time the offense was committed. It was not error to fail to charge this statute.

3. The written confession of the defendant shows a killing of a human being without the slightest excuse or justification. It is corroborated by the testimony of an accomplice and other evidence, direct and circumstantial. The verdict is supported by the evidence. The general grounds are without merit. See *Charles* v. *State*, 182 *Ga.* 359 (185 S. E. 341); *Logue* v. *State*, 198 *Ga.* 672 (32 S. E. 2d 397).

It was not error to deny the motion for new trial.

*Judgment affirmed. All the Justices concur.*

## DENIAL OF CERTIORARI IN UNITED STATES SUPREME COURT IN *WHITUS*

February 27, 1961. Petition for Writ of Certiorari to the Supreme Court of Georgia, denied.

Same case below, 216 Ga. 284, 116 SE2d 205.

## JUDGMENT IN UNITED STATES DISTRICT COURT IN *WHITUS*

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### ORDER

The Petition for Writ of Habeas Corpus for the release of Phil Whitus, Petitioner, and the Motions to Disallow Petition for Writ of Habeas Corpus filed here by R. P. Balkcom, Jr., Warden; State Penitentiary, Reidsville, Georgia, Respondent, having come on to be heard before me in open court on April 5, 1961, and came the Respondent represented by his Attorneys, Maston O'Neal, Solicitor General of the Albany Judicial Circuit of Georgia, and Paul Rodgers, a Deputy Assistant Attorney General of Georgia, and the Petitioner by his Attorneys, P. Walter Jones and William Harrell; and came the United States Assistant District Attorney for the Southern District of Georgia, Donald H. Fraser, as friend of the Court; and

The Petitioner having been produced in Court by Respondent in whose custody he was found to be by virtue of his conviction of the crime of murder in the Superior Court of Mitchell County, Georgia, which conviction had been affirmed by the Supreme Court of Georgia (*Whitus* v. *State*, 216 Ga. 284, 116 S.E. 2d 205), and

Petition for Writ of Certiorari thereto denied by the Supreme Court of the United States on February 21, 1961; and

The Attorneys for the Petitioner having contended that the Petition for Writ of Habeas Corpus should be granted on the ground that the Petitioner was convicted in the Superior Court of Mitchell County, Georgia, in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States because (1) there was no evidence to support the conviction, (2) there was systematic exclusion of Negroes from the grand and petit juries involved in Petitioner's conviction, and (3) the Petitioner was not sworn as a witness in his behalf and did not testify under direct and cross-examination; and the Attorneys for the Respondent having denied the validity of each of these three contentions and having further contended that the Petitioner has not exhausted the remedies available to him in the Courts of the State of Georgia as required by 28 USCA, sec. 2254, and, therefore, that the Petition for the Writ of Habeas Corpus should be dismissed; and

The Court having carefully considered the pleadings, the evidence (including the brief of evidence adduced in the trial of the Petitioner in the Superior Court of Mitchell County, Georgia) and the arguments of the Attorneys, and it appearing therefrom that (1) the Petitioner has not exhausted the remedies available to him in the Courts of the State of Georgia, and that there is neither an absence of available state corrective process ineffective to protect the rights of the Petitioner, as there exists the specific state statutory remedy of habeas corpus,

namely Code Section 50-101 of the Code of Georgia, which is as follows:

> "50-101. Any person restrained of his liberty under any pretext whatever, or any person alleging that another, in whom for any cause he is interested, is restrained of his liberty or kept illegally from the custody of the applicant, may sue out a writ of habeas corpus to inquire into the legality of such restraint.",

the Supreme Court of Georgia having clearly decided in *Wells* v. *Pridgen*, 154 Ga. 397, at p. 400, that:

> "It may be said that a judgment denying to a prisoner a constitutional right is void and he may be discharged on habeas corpus.",

and, consequently, that the Petitioner has not satisfied the requirements of 28 USCA, sec. 2254; (2) the Superior Court of Mitchell County, Georgia, and the Supreme Court of Georgia have considered Petitioner's contention of no evidence and determined same to be without merit and that the Petitioner has presented his contention of no evidence to the Supreme Court of the United States in his Petition for Writ of Certiorari and that the same was denied on February 21, 1961, and that an independent examination of the evidence by the Court manifests that the Petitioner's contention is without merit; (3) the Petitioner did not challenge the composition of the said juries at any time before or during his trial in the Superior Court of Mitchell County, Georgia, and that the Petitioner has not presented his contention of systematic exclusion of Negroes from the said juries to any Court of the State of Georgia and that the Petitioner in attempting to present a prima facie case for systematic exclusion failed to rebut the affidavit of B. T. Burson, a Jury Com-

missioner for Mitchell County, Georgia, negating such contention, which affidavit provided as follows:

"GEORGIA – MITCHELL COUNTY.

"Personally appeared before the undersigned officer, duly authorized to administer oaths, under the laws of Georgia, B. T. BURSON, who after first being duly sworn, deposes and says:

That he is a resident of Camilla, Mitchell County, Georgia, and has been for 45 years. At the present time, he is editor of the Camilla Enterprise, official newspaper organ for Mitchell County.

That prior to September 11th, 1959, your deponent was appointed one of the jury commissioners for Mitchell County by the Honorable Carl E. Crow, Judge of the Superior Court of the Albany Judicial Circuit, and your deponent has served in that capacity up to the present time.

That on September 11th, 1959, your deponent and the other jury commissioners completely revised the traverse jury list for Mitchell County. That in the revision of said jury list, no discrimination as to race, color or creed was practiced and on the list of traverse jurors, which was filed on September 11th, 1959, the following colored people were listed as traverse jurors and their names are in the jury box at the present time: David Acree, Jack Bullard, V. T. Catchings, Bernard Catchings, Silas Cochran, Jack Dawson, Claude Hollingshead, George Hollingshead, J. H. Hollingshead, Ira Harvey, Buford Jenkins, Robert D. Jester, Surprise Maples, Joe Murray, Clyde Mills, Frank McCoy, Fred Price, Lonnie Perry, Robert Stevens, Ravaldo Stevens, M. Sanders, Cleo Williams, James Woods, Alfred Allen, Joe Bell, Ira Brown, Otis Brown, Joe French, Joe Gooden, and L. C. Young.

Deponent makes this affidavit with the knowledge

that the same will be used in a hearing in the United States Court.

s / B. T. BURSON

Sworn to and subscribed before me,
this the 31st day of March, 1961.

s / HAZEL BULLARD"

(SEAL)

and which affidavit was admitted into evidence without the objection of the Petitioner, and that, consequently, such affidavit rendered the evidence of the Petitioner inconclusive; and (4) the Petitioner made no request at any time during his trial in the Superior Court of Mitchell County, Georgia, that he be sworn as a witness in his behalf or that he be permitted to testify under direct or cross-examination and that the Petitioner had guidance of counsel while making his statement to the jury, in that the Petitioner made a statement to the jury and did then leave the witness stand, and confer with his counsel, and return to the witness stand and further make his statement of defense to the jury, and that the Petitioner made no objection to the instructions of the trial judge pertaining thereto and that the Petitioner has not presented this contention to any Court of the State of Georgia; and

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by the Court that the Petition for the Writ of Habeas Corpus be and the same is hereby dismissed and the Petitioner, Phil Whitus, be and is hereby remanded to the custody of R. P. Balkcom, Jr.,

Warden, State Penitentiary, Reidsville, Georgia, Respondent herein.

s / FRANK M. SCARLETT

FRANK M. SCARLETT, Judge
United States District Court for
the Southern District of Georgia

Issued: April 14th, 1961.

## JUDGMENT IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *WHITUS*

(February 26, 1962)

Before HUTCHESON, CAMERON, and GEWIN, Circuit Judges.

PER CURIAM: This is an appeal from an order of the United States District Court for the Southern District of Georgia dismissing a petition for writ of habeas corpus.

Appellant is held under a sentence of death by electrocution imposed in a state court of Georgia for aiding and abetting one Leon Davis in the killing of Peter Glenn. The conviction was affirmed by the Supreme Court of Georgia on September 12, 1960, 216 Ga. 280, 116 SE (2) 205. Justices Duckworth, Head and Quillian dissented. On February 27, 1961, the United States Supreme Court denied certiorari, 365 U.S. 831. Our disposition of this appeal renders unnecessary reaching the merits of the petition, which alleges deprivation of constitutional rights in the state trial.

The district judge, after a hearing denied the petition for habeas corpus on the ground that petitioner had not exhausted his state remedies, as required by 28 U. S. C. Sec. 2254. Here the appellant argues that the habeas corpus remedy provided by 50-101 of the Georgia Code was not available to him.

The district judge, quoting from *Wells* v. *Pridgen*, 154 Ga. 397 at p. 400: "It may be said that a judgment denying to a prisoner a constitutional right is void, and he may be discharged on habeas corpus," held that the petitioner did have a state remedy and that he had not exhausted it and, so holding, dismissed the motion.

Finding ourselves in full agreement with the district judge's view, we affirm his judgment.

AFFIRMED.

## OPINION OF SUPREME COURT OF THE UNITED STATES IN *WHITUS* VACATING JUDGMENT OF CIRCUIT COURT AND REMANDING TO DISTRICT COURT FOR HEARING ON THE MERITS

Decided June 25, 1962.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of Georgia for a hearing on the merits of the petition for writ of habeas corpus.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

## OPINION AND JUDGMENT OF DISTRICT COURT IN *WHITUS* ON REMAND

The above stated case having come on regularly for trial before the Court without the intervention of a jury on April 30, 1963, and Petitioner, Phil Whitus being present in person together with P. Walter Jones appearing for petitioner, Phil Whitus, and Howard P. Wallace, Assistant Attorney General, State of Georgia, appearing for the respondent, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

**Findings of Fact**

I.

On the day of the trial it was agreed by counsel representing both parties that the evidence to be considered by this Court would be the transcript of the record in Civil Action No. 1231 which was a former petition for Writ of Habeas Corpus in this Court; the sworn affidavit of B. T. Burson, a Jury Commissioner of Mitchell County, Georgia; the transcript of evidence of the original Mitchell County trial; and the stipulation of facts as entered into between counsel in the case No. 1348, a companion Habeas Corpus case also heard this date. The Court hereby adopts all of the foregoing as the record in this case.

II.

From the foregoing the Court finds as a matter of fact the following:

1. Phil Whitus, an adult Negro, along with three co-defendants, was indicted in the January Term of 1960 by an all-white grand jury in Mitchell County, Georgia. He was indicted for the crime of murder and was accused, along with the three co-defendants, of having killed a white farmer in Mitchell County.

Petitioner was tried two days after his indictment by an all-white petit jury selected from a panel of petit jurors on which there were no Negroes. The jury returned a verdict of guilty, without recommendation of mercy, making death by electrocution the mandatory sentence.

Petitioner then made a motion for new trial, and upon the denial of same, appealed to the Supreme Court of

the State of Georgia. The conviction in the lower court was affirmed by the Supreme Court of the State of Georgia, 216 Georgia 280. Petitioner then filed a motion for rehearing, and upon the denial of this motion, certiorared the case to the Supreme Court of the United States. The certiorari to the Supreme Court was denied in February of 1961. On March 16, 1961, your petitioner filed a Writ of Habeas Corpus before the District Court of the United States for the Southern District of Georgia. On April 15, 1961, the District Court denied the plea of habeas corpus and your petitioner is appealing to this Court from that denial. In May of 1961 the Honorable Frank Scarlett signed a certificate of probable cause together with his approval and allowing your petitioner to appeal in forma pauperis.

On the 26th day of February, 1962, the Fifth Circuit Court of Appeals affirmed the decision of the District Court on the ground that the petitioner had not exhausted his State remedies. On April 11, 1962, the same court denied the petition for rehearing. On certiorari and on the 26th of June, 1962, the Supreme Court of the United States vacated the judgment and remanded the case to the United States District Court for the Southern District of Georgia for a hearing on the merits of the petition.

2. Petitioner is basing this action on two premises. First the absence of any evidence sufficient to connect him with the crime with which he was charged and subsequently found guilty and the second as to the systematic exclusion of members of the Negro race from the grand and petit juries in Mitchell County, Georgia. As to the first ground, there is ample evidence considered by this

Court that the killing for which petitioner is sentenced to die was accomplished by petitioner and others and that the provisions of Georgia Code Section 26-501 that a principal in the second degree is he who is present, aiding, and abetting the act to be done, and further that Georgia Code Section 26-502 which provides that a principal in the second degree shall receive the same punishment as provided for the principal in the first degree. I find that the evidence which substantiates this position is as follows:

(a) After it was apparent among all of the accused that the possibility of a crime of violence was eminent, petitioner left co-defendant, Leon Davis, at which time he had ample opportunity to remove himself entirely from the chain of events which resulted in the death of James Glenn.

(b) After the deceased was rendered unconscious, but before the infliction of any bullet wounds, petitioner, with the aid of another, helped put the body in Glenn's automobile.

(c) After leaving the unconscious Glenn and traveling toward Albany, petitioner returned with the perpetrator who had stated to petitioner that he was going back to kill Glenn.

(d) Petitioner drove perpetrator's automobile and used it to push Glenn's automobile which was no longer operational, but in which perpetrator and Glenn were riding to a more secluded spot. During said period of pushing petitioner had ample opportunities to abandon perpetrator in the car in which he was being pushed.

(e) After the vehicles stopped and the perpetrator

had descended from Glenn's car for the purpose of administering the fatal wounds, the petitioner raced the motor of the car he was driving in order to muffle the sound of the shots.

3. As to petitioner's second contention, the following facts are determined to be pertinent:

On September 11, 1959, a date some two months before the commission of the offense for which petitioner was tried and some four months before the trial itself, the jury commissioners revised the traverse jury list for Mitchell County without regard to race, color, or creed at which time the names of thirty (30) qualified colored jurors were placed in the box from which jurors are selected for both grand and petit juries.

The population of Mitchell County is between 19 and 20,000, which is composed of approximately 8,500 to 9,000 Negroes eighty-nine (89) of which number have a college education or better. All of the Negroes in Mitchell County with a higher education are school teachers and therefore exempt for jury duty. Of the thirty (30) Negro names in the jury box none are school teachers and none have received any higher education.

**Conclusion of Law**

From the record in this case the Court concludes:

1.

That the evidence before this Court is sufficient to show that although petitioner did not himself fire the fatal shots, he was present and aiding and abetting the commission of the crime within the provisions of the aforesaid Georgia Code Section 26-501.

2.

That there is no evidence to rebut the legal presumption that the following quoted portion of Georgia Code Section 59-106 was not lawfully carried out.

> "The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which had already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

3.

That neither the indictment presented in this case nor the jury verdict which followed resulted from any violation of petitioner's right to equal protection and due process under the 14th Amendment to the United States Constitution.

THEREFORE, petitioner's Writ of Habeas Corpus is hereby denied and judgment will be entered accordingly this 24th day of May, 1963.

s / F. M. SCARLETT
United States District Judge

**Judgment**

The above case coming on regularly for trial before the Court on the 30th day of April, 1963, and was duly submitted for consideration and decision, and the Court, after due deliberation, rendered its decision, and on the 30th day of April, 1963, made and filed its finding of fact, conclusions of law, and order for judgment.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by the Court that the Petition for the Writ of Habeas Corpus be and the same is hereby dismissed and the petitioner, Phil Whitus, be and is hereby remanded to the custody of R. P. Balkcom, Jr., Warden, State Penitentiary, Reidsville, Georgia; respondent herein."

This 24th day of May, 1963.

F. M. SCARLETT
United States District Judge

## OPINION AND JUDGMENT OF DISTRICT COURT IN *DAVIS* ON REMAND

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### ORDER

The above stated case having come on regularly for trial before the Court without the intervention of a jury on April 30, 1963 and petitioner, Leon Davis, being present in person together with B. Clarence Mayfield appearing for petitioner, Leon Davis, and Howard P. Wallace, Assistant Attorney General, State of Georgia, appearing for the respondent, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

### Findings of Fact

I.

By stipulation filed with the Court the day of the trial it was agreed along with other stipulations of facts that the evidence of the case consist of the transcript of the record in Civil Action No. 1231, a companion Habeas Corpus case earlier tried; the sworn testimony of petitioner; the sworn affidavit of B. T. Burson, a Jury Commissioner of Mitchell County, Georgia; the transcript of evidence of the original Mitchell County trial; and the affidavit of J. Neely Peacock, petitioner's original appointed defense counsel. The Court hereby adopts all of the foregoing as the record in this case.

II.

From the foregoing the Court finds as a matter of fact the following:

1. Petitioner, a colored male, having been indicted by a Grand Jury composed entirely of Caucasians was tried and convicted of murdering James Glenn, a Caucasian, by an all white jury in Mitchell County, Georgia, on January 13, 1960, and was sentenced to die in the electric chair, which conviction and sentence was affirmed by the Supreme Court of Georgia, *Davis* v. *State,* 216 Georgia 110; 114 S. E. 2d 877.

Subsequently petitioner filed a Petition for Habeas Corpus in the City Court of Reidsville which was dismissed. The Supreme Court of Georgia affirmed this dismissal on September 12, 1961, and the Supreme Court of the United States denied a Petition for Writ of Certiorari on March 5, 1962. Petitioner then sought a Writ of Habeas Corpus in this Court which dismissed his Petition on July 11, 1962. On July 12, 1962, the United States Court of Appeals for the Fifth Circuit granted a Certificate of Probable Cause which in effect permitted petitioner to refile his Writ of Habeas Corpus which is now before the Court.

2. On September 11, 1959, a date some two months before the commission of the offense for which petitioner was tried and some four months before the trial itself, the jury commissioners revised the traverse jury list for Mitchell County without regard to race, color, or creed at which time the names of thirty (30) qualified colored jurors were placed in the box from which jurors are selected for both grand and petit juries.

3. The population of Mitchell County is between 19 and 20,000, which is composed of approximately 8,500 to 9,000 Negroes, eighty-nine (89) of which number have a college education or better. All of the Negroes in

Mitchell County with a higher education are school teachers and therefore exempt for jury duty. Of the thirty (30) Negro names in the jury box none are school teachers and none have received any higher education.

**Conclusion of Law**

From the record in this case the Court concludes:

1.

That the evidence of petitioner adduced from the record with regard to systematic exclusion fails to rebut the evidence in the record to the contrary, specifically the affidavit of Jury Commissioner Burson, to the effect that in September, 1959, the names of thirty (30) colored jurors were placed in the jury box used in Mitchell County.

2.

That there is no evidence to rebut the legal presumption that the following quoted portion of Georgia Code Section 59-106 was not lawfully carried out.

> "The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror

shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

3.

That neither the indictment presented in this case nor the jury verdict which followed resulted from any violation of petitioner's right to equal protection and due process under the 14th Amendment to the United States Constitution.

THEREFORE, petitioner's Writ of Habeas Corpus is hereby denied and judgment will be entered accordingly this 24th day of May, 1963.

F. M. SCARLETT
United States District Judge

**Judgment**

The above case coming on regularly for trial before the Court on the 30th day of April, 1963, and was duly submitted for consideration and decision, and the Court, after due deliberation, rendered its decision, and on the 30th day of April, 1963, made and filed its finding of fact, conclusions of law, and order for judgment.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by the Court that the Petition for the Writ of Habeas Corpus be and the same is hereby dismissed and the petitioner, Leon Davis, be and is hereby remanded to the custody of R. P. Balkcom, Jr., Warden, State Penitentiary, Reidsville, Georgia, respondent herein.

This 24th day of May, 1963.

F. M. SCARLETT
United States District Judge

## APPENDIX "B"

## OPINION AND JUDGMENT OF CIRCUIT COURT IN *WHITUS* AND *DAVIS* ON APPEAL

(June 18, 1964.)

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and CARSWELL, District Judge.

WISDOM, Circuit Judge: The difficulties this post-conviction habeas corpus problem presents inhere in the dilemma in which a Negro defendant is placed when he is brought to trial in a state court in a county where Negroes are systematically excluded from juries.[1] The matrix within which this problem developed is the social structure of the deep South.

The two Negro petitioners were tried in the Superior Court of Mitchell County, Georgia, for the murder of a white farmer. They were convicted and sentenced to

[1] See Sofaer, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U.L. Rev. 78 (1964); Reitz, Federal Habeas Corpus: Impact of an Abortive State proceeding, 74 Harv. L. Rev. 1315, 1324-32 (1961); Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 103-108 (1959); Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423 (1961); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Schaeffer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. (1956); See especially Comment, Negro Defendants and Southern Lawyers: Review in Federal Habeas Corpus of Systematic Exclusion of Negroes from Juries, 72 Yale L. Jour. 559 (1963); Note, Lightfoot, Waiver of Right to be Tried Before Jury from which Members of One's Race have not been Systematically Excluded, 16 Ala. L. Rev. 117 (1963). See also Note, Racial Discrimination, Systematic Exclusion in Jury Selection, 24 La. L. Rev. 393 (1964).

die. Mitchell County is a small county in rural Georgia.[2] No Negro has ever served on a grand jury or on a petit jury in Mitchell County. The attorneys for the petitioners were fully aware of this fact. They were also fully aware of the hostility that an attack on the all-white jury system would generate in a community already stirred up over the killing. Without consulting the defendants, the attorneys decided not to object, in the trial or on appeal, to the systematic exclusion of Negroes from either jury. Later, in this habeas corpus proceeding, the federal district court held that the attorneys' non-assertion in the state court of a timely objection to the composition of the juries was an effectual waiver of that objection.

Many constitutional rights may be waived. And, in the interests of legal economy and the integrity of orderly procedure in state courts, a defendant's non-assertion of certain constitutional rights before a trial or in the early stages of a trial has been treated as a "waiver" of those rights. This handy rule applies, for example, to the right to be tried by a jury or the right to counsel. It does not fit this case.[3]

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[2] The population of Mitchell County, according to the 1960 census is about 20,000, 9,000 Negroes and 11,000 white persons.

[3] "The rights which a defendant may waive are those which establish procedures designed to insure fairness, but which a particular defendant may deem it advantageous to forego. The clearest example, perhaps, is the right to jury trial, which many defendants waive in the expectation that trial by a judge alone will be beneficial to their cause. . . . ¶ *Johnson* v. *Zerbst* permits a defendant to forego some of the constitutional safeguards if he deems it to his advantage to do so. The law respects his choice in the first instance and holds him to it if he should later change his mind. These considerations are not relevant when the defendant 'waives' an opportunity to protest unconstitutional action, in the sense that a violation of a state rule of procedure forecloses

The core of this case is the lack of remedy in the state courts. The petitioners and their attorneys had no desire to give up their right to be tried by a jury chosen without regard to the race of the jurors. It was not to their interest to do so — except as a choice of evils. A choice of evils was indeed the only state remedy open to them. The petitioners could choose to be prejudiced by the hostility an attack on the all-white jury system would stir up. Or they could choose to be prejudiced by being deprived of a trial by a jury of their peers selected impartially from a cross-section of the community. This is the "grisly,"[4] hard, Hobson's choice the State puts to Negro defendants when it systematically excludes Negroes from juries; white defendants are not subjected to this burden.

The constitutional vice is not just the exclusion of Negroes from juries.[5] It is also the State's requiring Negro defendants to choose between an unfairly constituted jury and a prejudiced jury. We hold that this

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some part of the review otherwise available in the state judicial system. If a forfeiture of constitutional rights is to be made the outcome of this kind of lapse, it must be explained on some basis other than an interest in allowing a defendant to follow what seems to him his most advantageous course of action." Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1266, 1333, 1336 (1961).

[4] This is the term Mr. Justice Brennan used in Fay v. Noia, 372 U.S. 391, 440, to describe Noia's predicament.

[5] The exclusion of Negroes from petit juries trying Negro defendants has been repeatedly held to violate the equal protection clause as well as the due process clause of the Fourteenth Amendment. Reece v. State of Georgia, 1955, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 17; Patton v. State of Mississippi, 1947, 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76; Norris v. State of Alabama, 1935, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; Carter v. State of Texas, 1900, 177 U.S. 442, 20 S.Ct. 687, 44 L. Ed. 839; United States ex rel. Goldsby v. Harpole, 5 Cir. 1959, 263 F. 2d 71, *cert. den'd* 1959, 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78.

discrimination violates both the equal protection and the due process clauses of the Fourteenth Amendment.[6]

I.

Oversimplifying the facts, the homicide occurred November 15, 1959, when Leon Davis, one of the petitioners, killed a respected white farmer after an altercation between the two precipitated by each causing his automobile to bump into the other's automobile. Phil Whitus and two other Negroes were in Davis' automobile and were at the scene of the killing. All four were indicted for murder. The attorneys for the defendants decided against requesting a change of venue.[7] January 13, 1960, the jury found Davis and Whitus guilty as charged.[8] Under Georgia law, since the jury withheld a recommendation of mercy, the verdict carried the sentence of death by electrocution.

The petitioners filed unsuccessful motions for new trials, appeals to the Supreme Court of Georgia, and petitions for certiorari to the United States Supreme Court.[9] Davis contended that the trial court erred in

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[6] We have based our decision on Fay v. Noia, 372 U.S. 391. At the same time, we have considered, as Mr. Justice Harlan would require the Court to consider, "the adequacy, or fairness, of the state ground."

[7] Mr. Walter Jones, attorney for Whitus, testified that he "had a conference with the other attorneys in case and we agreed that [if a request for a change were made and acted on favorably] the trial judge might change it to Baker County and we were better off in Mitchell."

[8] The two other defendants pleaded guilty and were sentenced to life imprisonment. One was sixteen years of age. The other testified for the State.

[9] Whitus v. State, 1960, 216 Ga. 284, 116 S.E. 2d 205; *cert. den'd* 1961, 365 U.S. 831, 81 S. Ct. 718, 5 L. Ed. 2d 708; Davis v. State, 1960, 216 Ga. 110, 114 S.E. 2d 877.

admitting in evidence an allegedly coerced confession and in making an erroneous charge to the jury on insanity. Whitus contended that he did not participate in the killing in any way; that there was no conspiracy to commit any crime; and that whatever assistance he gave to Davis he gave unwillingly at the point of Davis' gun. In the state court proceedings petitioners did not refer to the composition of the juries, except for a vague allusion in the petition for certiorari to the United States Supreme Court.

The attorneys first presented the issue now before this Court in a petition for habeas corpus in the United States District Court. That court denied the petition on the ground, among others, that a state remedy through habeas corpus was still available. We affirmed. *Whitus* v. *Balkcom*, 5 Cir. 1962, 299 F. 2d 844. The Supreme Court, *per curiam*, vacated the judgment and remanded the case. *Whitus* v. *Balkcom*, 1962, 370 U.S. 728, 82 S. Ct. 1575, 8 L. Ed. 2d 803. Again the district court dismissed the petition.[10] The petitioners are before us on their appeal from that order of dismissal.

The factual question of the existence of the custom of systematic exclusion of Negroes from the Mitchell County juries is not at issue. The appellee relies olely on the doctrine of waiver. The appellee's brief states: "Rather than argue the substantive issue of systematic exclusion of Negroes from the juries of Mitchell County and thereby attempt to overcome this Court's decision

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[10] The district court held: (1) the evidence was sufficient to support the conviction; (2) there was no evidence to support the contention that there was discrimination in the selection of the jury; (3) there was no violation of the petitioner's right to equal protection or due process.

in *United States ex rel. Seals* v. *Wiman*, 5 Cir. 1962, 304 F. 2d 53, *cert. den'd*, 1963, 372 U.S. 924, 83 S. Ct. 741, 9 L. Ed. 2d 729, appellee will admit for the purposes of this Appeal that the present case is adversely covered by such decision."[11]

II.

The classic, *Johnson* v. *Zerbst* definition of waiver is "an intentional relinquishment or abandonment of a known right or privilege."[12] The general principles governing "waiver" of constitutional rights, as that doctrine is applied in federal habeas corpus post-conviction proceedings, are succinctly stated in Mr. Justice Frankfurter's separate opinion in *Brown* v. *Allen*, 1953, 344 U.S. 443, 503, 73 S. Ct. 397, 97 L. Ed. 469:

> "Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a State's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal Constitution may be waived at the trial, and may likewise be waived by failure to assert such errors on appeal. When a State insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim

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[11] The district court found that there was a complete revision of the jury list two months before the commission of the crime, and the names of thirty Negroes were in the jury box at the time of the trial. The testimony, however, showed that no Negro had ever served on either the grand jury or the petit jury. The jury lists were based on the names on the County tax returns. These returns were on yellow sheets for the Negroes and white sheets for the whites. See Avery v. Georgia, 1953, 345 U.S. 559, 73 S. Ct. 891, 97 L. Ed. 1244. See also Collins v. Walker, 5 Cir. 1964, 329 F. 2d 100.

[12] Johnson v. Zerbst, 1938, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461.

> and thus have no right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal. *However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding.*" (Citations omitted. Emphasis added.)

The Supreme Court has recently expressed itself on the subject of waiver in *Fay* v. *Noia*, 1963, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837, a case pertinent here on the facts. The Court said:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief. . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. *Cf. Carnley* v. *Cochran*, 369 U.S. 506, 513-517; *Moore* v. *Michigan*, 355 U.S. 155, 162-165. *A choice made by counsel not participated in by the petitioner does not automatically bar relief.* Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. E.g., *Rice* v. *Olson*, 324 U.S. 786." (Emphasis added.)

In addition to its holding on waiver,[13] *Fay* v. *Noia* makes it clear that to invoke the Great Writ a petitioner

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[13] See Daniels v. Allen, 1953, 344 U.S. 482, 73 S. Ct. 420, 97 L. Ed. 502. "Clarity of analysis requires that each device be treated as an isolated doctrine, though such treatment is essen-

need exhaust only the state remedies available to him *at the time he files his petition*. As to the applicability of the doctrine of "an adequate and independent state ground," the Court said:

> "[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." 372 U.S. at 399.

Two recent decisions of this Court deal with waiver in systematic exclusion cases: *United States ex rel. Goldsby* v. *Harpole*, 5 Cir. 1959, 263 F. 2d 71, *cert. den'd* 1959, 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78 and *United States ex rel. Seals* v. *Wiman*, 5 Cir. 1962, 304 F. 2d 53, *cert. den'd* 1963, 372 U.S. 924, 83 S. Ct. 741, 9 L. Ed. 2d 729. Judge Rives was the author of both opinions; the author of this opinion was on both panels. In each case the attorneys for the Negro defendant did

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tially artificial. If exhaustion is interpreted to include presently unavailable remedies, it would appear that the waiver and adequate-state-ground rules are merely semantic variants of the exhaustion requirement. Application of these principles to a given set of facts produces identical results. Thus, . . . a habeas court could hold that by failing to exhaust a remedy no longer available, petitioner has waived his procedural rights and has created an adequate and independent state ground for his continued detention. No matter which theory is used, petitioner is denied habeas corpus relief for failure to employ a presently unavailable remedy. Once it is decided, however, that the exhaustion requirement applies only to presently available remedies, an applicant would not be penalized under that theory for failing to appeal if he could no longer do so. But such an interpretation of the exhaustion requirement would be rendered nugatory if failure to appeal were to result in a forfeiture under the theories of waiver or adequate state ground. The danger in regarding the doctrines separately is this possibility of antithetical application." Sofaer, *supra*, Note 1, 39 N.Y.U.L. Rev. 78, 82.

not make a timely objection to the composition of the jury. In spite of this non-compliance with the state rule requiring such an objection to be made in the early stages of a trial,[14] this Court held that there was no waiver. In *Goldsby* "we held that the conduct of Goldby's counsel without consultation with his client did not bind Goldsby to a waiver of his constitutional right to object to the systematic exclusion of members of his race from the trial jury."[15] With regard to the grand jury, Judge Rives observed that systematic exclusion of Negroes from a grand jury involves consequences less serious than the consequences of their exclusion from a trial jury. The Court held that the petitioner had waived any objection to the grand jury. In discussing this case in *Seals*, however, Judge Rives pointed out: "[In *Goldsby*] the evidence to support objections to the composition of the jury was entirely unknown to the defendant Seals, who was at no time even consulted by his attorney on this subject. Further, that evidence was not known to the attorney who defended Seals. Finally, that evidence was not 'easily ascertainable.'" 304 F. 2d at 69. In *Seals*, therefore, the Court held that there was no waiver of the constitutional objection to the composition of either the petit jury or the grand jury.

We approved of the holdings in *Goldsby* and *Seals*. The important fact in each case was that the attorney for the Negro defendant did not consult his client with regard to his decision to refrain from making an attack

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[14] See Seals v. State, 1961, 271 Ala. 622, 126 So.2d 474, *cert. den'd*, 366 U.S. 954; Cobb v. State, 1962, 218 Ga. 10, 126 S.E.2d 231, *cert. den'd* 1963, 371 U.S. 948, 83 S. Ct. 499, 9 L.Ed.2d 497.

[15] United States ex rel. Seals v. Wiman, 5 Cir. 1962, 304 F.2d 53, 69.

on the jury system; and in *Seals* the evidence relating to systematic exclusion of Negroes from the juries was unknown to the defendant's attorney. *Goldsby* has been construed as holding that in a capital case "before a defendant will be deemed to have waived his objection to trial by a petit jury infected by an unconstitutional exclusion for race, the record must show that the defendant, not just his counsel, took the action deliberately and after advice."[16] *Adams* v. *United States*, 5 Cir. 1962, 302 F. 2d 307, 314 (dissenting opinion). *Goldsby*, however, does not go that far. The opinion makes this significant reservation

> "In ordinary procedural matters, the defendant in a criminal case is bound by the acts or non-action of his counsel. . . . It might extend to such a waiver even in capital cases, where the record affirmatively shows that the particular jury was desired by defendant's counsel after conscientious consideration of that course of action which would be best for the client's cause." 263 F. 2d 71 at 83.

The unusual example – for an exclusion case – which Judge Rives gives is the only type of exclusion situation where there is a possibility of a true waiver based on a free option.[17] When a defendant's attorney prefers a particular jury, there is "a voluntary choice between two

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[16] Cf. "Before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." Patton v. United States, 1930, 281 U.S. 276, 312, 50 S. Ct. 263, 74 L. Ed. 854. "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights," and "do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 1938, 304 U.S. 458, 464.

[17] For example, in Carruthers v. Reed, 8 Cir. 1939, 102 F.2d 933, *cert. den'd* 1939, 307 U.S. 643, the trial attorney knew certain jurors and believed that the defendant would receive a fair trial.

meaningful alternatives."[18] Absent this preference, there is no voluntary choice to relinquish the right to a fairly constituted jury when the right *must* be relinquished in order not to imperil the defense.[19] Even in a situation where a defendant's attorney has a considered preference for a particular jury, under the decisions the attorney must consult with his client and the defendant must "understandingly and knowingly" forego his federal claims before a waiver would be established. But if the defendant lacks the capacity "understandingly and knowingly" to waive his right, it is an empty gesture to require consultation and it is meaningless to speak of waiver.

To return to the case before us, here the attorneys for the petitioners are able, conscientious, experienced,

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[18] Comment, *supra*, note 4, 72 Yale L. Jour. at 567.

[19] Professor Reitz brings out clearly the "great difficulties" that "arise in this attempted transition from 'an intentional relinquishment or abandonment of a known right of privilege.'" [Johnson *v.* Zerbst] to a case involving an abortive state proceeding. ("An abortive state proceeding has occurred when a state criminal defendant, at some time in the past, had an opportunity to present to his own state's courts any question relevant to the power of the state to hold him in custody but lost that opportunity can no longer seek any relief there.") "The most that was waived was the right to review in the state Supreme Court. It takes some additional extrapolation to make that equivalent to waiver of the underlying federal right." Reitz, *supra*, note 1, 74 Harv. L. Rev. 1335. See also Moyers v. Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 71 Harv. L. Rev. 1, 6 (1960). In discussing "waiver" of the guarantee against double jeopardy, the authors wrote, "Yet it is obvious that a waiver rationale here, as elsewhere, serves only to state the conclusion without explaining the reason for it." See also Sofaer, *supra*, Note 1, 39 N.Y.U.L. Rev. 78, 83-91; Comment, Waiver of the Privilege Against Self Incrimination, Note, Waiver of the Privilege Against Self Incrimination, 11 Stan. L. Rev. 811 (1962).

court-appointed white lawyers.[20] The petitioners are ignorant Negroes whose frame of reference could not have included any comprehension of the traditional constitutional rights incident to a fair trial. Davis is illiterate and Whitus semi-illiterate. The Attorney General for the State, in his brief, makes a point of this in order to further his contention that the defendants are bound by the fictitious waiver of their attorneys:

> "It is evident from the record that defendants were men of lesser intelligence at least in their understanding of the law and were completely dependent upon their attorneys for a proper defense. . . . The testimony of the appellant, Leon Davis, at the first hearing before the District Court for the Southern District of Georgia lucidly points out that he does not comprehend the nature or meaning of the Constitution or the rights provided thereunder and is, in fact, entirely dependent on counsel for his defense."

In these circumstances, it is unrealistic for the Court to attach significance to the presence or absence of consultation of the attorneys with the defendants and the presence or absence of express consent by the defendants to the so-called waiver. For the petitioners in this case, these protections are simply not adequate safeguards against forfeiture of constitutional rights. The defendants would have been no better off after consultation than before: had they been consulted and had

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[20] The brief of the Attorney General states:

> "The court will remember that Honorable P. Walter Jones has represented Phil Whitus from the outset of this case. A fleeting glance at the history of this case proves conclusively that Mr. Jones has exerted every effort in behalf of the appellant and is to be commended for his unselfish and tireless defense of this individual."

they given instructions contrary to the attorneys' advice, they would have been worse off. As the Supreme Court of Georgia said in *Cobb* v. *State*, 1962, 218 Ga. 10, 126 S. E. 2d 231, *cert. den'd* 1963, 371 U.S. 948, 83 S. Ct. 499, 9 L. Ed. 2d 497:

> "Where, as here, the defendant knows nothing of his rights or whether it would be strategically wise to waive them in certain situations, *it would be to require a vain and useless thing that he personally consent to such waiver.* If appointed counsel had been compelled to consult and be controlled by the directions given him by his client, who was only fifteen years old, and according to his own insistence, knew nothing of law, courts or legal procedure, his usefulness would have been destroyed and the defendant would not have been represented by counsel within the meaning of Art. I, Sec. I, Par. V of the Georgia Constitution (Code Ann. §2-105)." (Emphasis added.)

*Cobb* involved facts very similar to the facts in the instant case. The futility of requiring an express waiver from the fifteen year old Negro defendant led the Georgia Supreme Court to conclude that "the waiver may be made on his behalf by counsel appointed by the court to defend him."

Here, as in *Cobb*, the evidence showed no consultation between the attorneys and the petitioners on waiver and here too the petitioners lacked the comprehension to make an intelligent waiver. If, notwithstanding, the State may treat the attorneys' inaction as implied "waiver," it is because the State, for its purposes, may establish a ground rule that orderly procedures compel a client to be bound by his lawyer's action and inaction[21]

[21] Popeko v. United States, 5 Cir. 1961, 294 F.2d 168; Kennedy v. United States, 5 Cir. 1958, 258 F.2d 883.

and require also that objections to juries be urged in the early stages of a trial; otherwise, state procedures would be circumvented.

Such a state rule, so reasonable on its face, is an "independent and adequate state ground,"[22] which Federal courts generally should respect. But, as stated in *Fay* v. *Noia*, "Federal courts have *power* under the federal habeas corpus statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies." 372 U.S. at 398.

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[22] In Fay v. Noia, 372 U.S. 391, 429-32, the Court commented: "The fatal weakness of this contention is its failure to recognize that the adequate state-ground rule is a function of the limitations of *appellate* review. . . . And so we have held that the adequate state-ground rule is a consequence of the Court's obligation to refrain from rendering advisory opinions or passing upon moot questions. . . . But while our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not too confined. The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*. The entire course of decisions in this Court elaborating the rule of exhaustion of state remedies is wholly incompatible with the proposition that a state court *judgment* is required to confer federal habeas jurisdiction. And the broad power of the federal courts under 28 U.S.C. §2243 summarily to hear the application and to 'determine the facts, and dispose of the matter as law and justice require,' is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment, it can act only on the body of the petitioner. . . . In Noia's case the only relevant substantive law is federal—the Fourteenth Amendment. State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal. Cf. *Dice* v. *Akron, C. & Y.R. Co.*, 342 U.S. 359. That is not to say that the States have not a substantial interest in exacting compliance with their procedural rules from criminal defendants asserting federal defenses. Of course orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such procedure. But

The overriding duty of a federal court to protect the federally guaranteed rights of the individual citizen impels the court to inquire into the reasonableness, the constitutionality, of the state rule. "Reasonable consequences attached by the states to a failure to comply with reasonable rules must accordingly be respected. . . . But this assuredly does not mean that every last technicality of state law must be sacrosanct." Hart, Foreword: Time Chart for the Justices, 73 Harv. L. Rev. 84, 118 (1959). Professor Hart's comments on a state rule that the escape of a prisoner nullifies his motion for a new trial[23] are apt here:

> "The reasonableness of the state rule and, even more, the reasonableness of its application in the particular circumstances of the case cried aloud for questioning. Life was at stake. The constitutional

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that state interest 'competes . . . against an ideal. . . . [the] ideal of fair procedure.' Schaeffer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 5 (1956). And the only concrete impact the assumption of federal habeas jurisdiction in the face of a procedural default has on the state interest we have described, is that it prevents the State from closing off the convicted defendant's last opportunity to vindicate his constitutional rights, thereby punishing him for his defaults in the future." Cf. Williams v. Georgia, 1955, 349 U.S. 375, 393-405, 75 S. Ct. 814, 99 L. Ed. 1161. In McKenna v. Ellis, 5 Cir. 1960, 280 F. 2d 592, 603 *rehearing denied and opinion modified*, 289 F. 2d 928, *cert. den'd* 1961, 368 U.S. 877, this Court granted habeas corpus although the prisoner had not complied with Texas procedure. We held: "Article 543 of the Texas Code of Criminal Procedure sets forth very clearly the requirements for a continuance. We do not question the propriety, the reasonableness, the constitutionality of Article 543. Such detailed and technical requirements of a motion for continuance, no doubt, serve a salutary purpose in a proper case, but they cannot justify putting a defendant to trial when he has been given no fair opportunity to secure the attendance of his witness."

[23] See Irvin v. Dowd, 1959, 359 U.S. 394, 79 S. Ct. 825, 3 L. Ed. 2d 900.

> rights which the prisoner asserted went to the very jugular of a system of ordered liberty — the right to be judged in an orderly trial before an unprejudiced tribunal rather than by the whipped-up emotions of the community. States may punish an escape as a crime. But surely not all rights to a fair trial can become forfeit because of it. Especially are doubts stirred when the escape in question can be viewed as a form of self-protection from the very community hostility against which the prisoner had previously protested in vain by lawful means. These considerations called for close scrutiny of the opposing considerations advanced by the state to show that the forfeiture it had decreed was necessary for the due enforcement of law." 73 Harv. L. Rev. at 116.

III.

This case is "one of those extraordinary cases" Mr. Justice Frankfurter may have had in mind in the caveat to his discussion of waiver in *Brown* v. *Allen*: the federal "claim goes to the very foundation of [the] proceeding." When Negroes are systematically excluded from juries, the fictitious waiver rule puts Negro defendants, and only Negro defendants, to a choice of evils that deprives them of an effective remedy.

A. We know what happens when the attorney's inaction is treated as a waiver of the exclusion issue: the Negro defendant loses the benefits of a trial by his peers. We quote two sentences on the subject from a Supreme Court opinion in 1879:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

> . . . [C]ompelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is . . . a denial to him of equal protection of the law." *Strauder* v. *West Virginia*, 1879, 100 U.S. 303, 309, 25 L. Ed. 664.

B. We believe that we know what happens when a white attorney for a Negro defendant raises the exclusion issue in a county dominated by segregation patterns and practices: both the defendant and his attorney will suffer from community hostility.

The burden of making hard decisions is one that attorneys are used to carrying. But the burden is exceptionally heavy when the life and liberty of an accused depend on the weight to be given something as imponderable as the extent of the additional anti-Negro reaction that would be engendered by attacking the all-white jury system. As if this were not sufficiently difficult, there is the intolerable complication that the reaction against an attorney who raises the exclusion issue may stretch from persiflage to ostracism. The intensity of the reaction will depend on how bad racial relations are in the particular county, the standing of the defendant's attorney at the bar and in his community, the happening of unpredictable local events, and coincidental accidents of history. The reprisals may be real or chimerical; if chimerical, they may seem real to any particular attorney. All of this adds up to pressures which may, consciously or subconsciously, affect an attorney's measured evaluation of which evil is the lesser evil in this Hobson's choice of evils.[24] Later, should there be a post-conviction

[24] "In response to a questionnaire prepared by the *Journal* and

habeas corpus proceeding, the attorney's knowledge that his integrity may be questioned and his professional skill second-guessed in an antagonistic atmosphere may cause him to slant his explanation for making the wrong guess. The exposure of a Negro on trial for his life to these factors destructive of justice and federally protected rights and harmful to the public policy of encouraging adequate legal representation of indigents is a monstrous price to pay for the convenience to the state of the pro-

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sent to 100 southern lawyers whose names were picked at random. 20 stated that they felt the Fifth Circuit was correct in taking judicial notice that lawyers in the South rarely raise the issue of jury exclusion. Fourteen felt the Fifth Circuit was incorrect either because there is no jury exclusion (9) or because the issue is raised when the facts so warrant (5).

"In answer to the question whether you would 'raise at trial level the issue of systematic exclusion of Negroes from the jury, if you thought there was reasonable evidence of such exclusion,' 21 answered yes and 13 responded no.

"Reasons given for the failure to raise the objection included a desire not to prejudice the lawyer's position in the community (2), a desire not to prejudice the client's interests by stirring up community feeling against him, thereby hoping to achieve the best result for the Negro client (11), and a feeling that it would make no difference to the outcome of the case whether or not there is jury exclusion (15).

"In response to the questionnaire prepared by the *Journal*, one Alabama lawyer wrote:

> "If I accepted a Negro for jury duty and put him on with 11 white men I would prejudice the white men against me and my client."

A lawyer in Florida wrote:

> "It has been my observation and it is my present thinking that the interests of a Negro client in the South would be better protected by the white man than colored."

Comment, Negro Defendants and Southern Lawyers: Review in Federal Habeas Corpus of Systematic Exclusion of Negroes from Juries, 72 Yale L. Journ 559, 565 (1963).

cedural rule euphemistically termed "waiver."[25]

C. We turn now to the bases in the decision-making process for judicial consideration of these matters.

(1) We start with a *fair inference*. If the segregation policy in a county is so strong that Negroes are systematically excluded from the jury system, community hostility would be generated against any "trouble-maker" who would attempt to upset the all-white make-up of the jury system. Such hostility would directly affect the Negro defendant. It would carry over and affect the defendant's attorney. Whether horrendous or merely embarassing, the prospect of social extra-legal pressures distorting an attorney's judgment is a burden only Negro defendants bear.

(2) In *Goldsby* we took *judicial notice* of the fact that

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[25] "It is relevant to ask, for purposes of a corollary to the federal exhaustion rule, whether the price of utilizing the state remedies was too great . . . This is particularly significant in the case of the Negro defendant who had to give up the chance of an unprejudiced trial in order to raise the constitutional objections at the time prescribed by state procedural law. In some circumstances, the situation might be such that the defendant could not be said to have had an effective state remedy available to him, even though formally a method for challenging the juries existed. But even in less extreme cases, there ought to be serious doubt that a defendant should be put to this Hobson's choice with respect to a constitutionally guaranteed right. ¶ Not everyone will agree that the federal courts should go to the merits of these applications. It seems to me, however, that entertaining them would not pose a serious threat to the general requirement of exhaustion of state remedies, since the factors which governed the actions of the defendants were unrelated to the exhaustion rule." Reitz, *supra*, Note 1, 74 Harv. L. Rev. at 1372.

in some areas in the deep South lawyers almost never raised the exclusion issue.[26] We said:

> "Moreover, the very prejudice which causes the dominant race to exclude members of what it may assume to be an inferior race from jury service operates with multiplied intensity against one who resists such exclusion. . . . Such courageous and unselfish lawyers as find it essential for their clients' protection to fight against the systematic exclusion of Negroes from juries sometimes do so at the risk of personal sacrifice which may extend to loss of practice and social ostracism. ¶ As Judges of a Circuit comprising six states of the deep South, we think that it is *our duty to take judicial notice* that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries." (Emphasis added.) 263 F. 2d at 82.

The effect will, of course, be accentuated if the case is one involving the murder of a white man by a Negro or the rape of a white woman by a Negro or if the timing of a trial should happen to coincide with fevers running high because of bad racial relations.

(3) The fact, standing alone, that no Negro has ever served on a jury in the particular county where his case is tried strongly indicates, if it does not create a presumption, that there was a tacit agreement by the bar of that county not to raise the constitutional issue. In such case the Negro would have no adequate remedy, either because of the powerful environmental factors infecting the jury system or because of ineffective representation by counsel. At the very least, that fact alone

[26] McNaughton, Judicial Notice-Excerpts Relating to the Morgan-Wigmore Controversy, 14 Vand. L. Rev. 778, 789 (1961); McCormick, Judicial Notice, 5 Vand. L. Rev. 296, 315 (1952).

*establishes a prima facie case* putting the burden of going forward on the State to show that there was a true waiver; that the non-assertion of the defendant's constitutional right was not caused by environmental pressures or ineffective representation by the defendant's attorney.

(4) This case is a doubly strong one for the defendant because, unlike *Goldsby*,[27] we have the benefit of *specific testimony from Whitus's trial attorney* on the motivation for his non-action. As we noted in *Goldsby*, "Conscientious southern lawyers often reason that the prejudicial effects on their client of raising the issue far outweigh any practical protection in the individual case." 263 F. 2d at 82. Here, Mr. Walter Jones, attorney for Whitus, testified that he had hopes for an acquittal of his client on the charge of murder, whatever other offense he might have committed. In the habeas corpus hearing Mr. Jones testified:

> "Q. Did you confer with Phil Whitus and receive his express permission to waive his objection to the trial jury unconstitutionally selected and discriminatorily selected?

[27] In *Goldsby*, the defendant's first lawyer, a Negro, was willing to raise the exclusion issue. His white lawyer refused to join with the Negro lawyer in representing the defendant and did not raise the exclusion issue after the Negro lawyer left the case. The attorney's failure to raise the issue and the lack of any explanation could give rise to the inference that the trial counsel was not acting in the best interests of his client. In *Goldsby*, however, we said, as we do here, that sometimes raising the issue may cause more prejudice than it is worth. The necessity for the attorney making this choice, not just the composition of the jury, is the constitutional vice. See Comment, Negro Defendants and Southern Lawyers: Review in Habeas Corpus of Systematic Exclusion of Negroes from Juries, 72 Yale L. Jour. 559, 564 (1963).

"A. No; I did not.

"Q. Why did you not raise this question on the trial of Phil Whitus in Mitchell County, Georgia?

"A. Well, I had talked to Phil Whitus and I conferred with the attorneys who represented the other defendants and I knew approximately what they would testify and I *had hopes that I could obtain an acquittal under the facts as I knew them, and I realized that the case had created quite a bit of notoriety and to have brought up such a question at the lower court would have filled the air with such hostility that an acquittal would have been almost impossible.*

. . .

"Q. The Solicitor General asked you just now if you requested a change of venue. Did you have a conference with the judge concerning the possibility of that?

"A. No, sir. I had a conference with the other attorneys in the case and we agreed that he might change it to Baker County and we were better off in Mitchell.

"Q. Would there have been the same discrimination in Baker County?

"A. Yes, sir.

"Q. As I understand, you said that *the reason for not raising the question of discrimination was because you thought it would create a hostile feeling and would hurt your client?*

"A. Yes, sir." (Emphasis added.)

The measure of the merits of Whitus's defense and the measure of his dilemma is that the Chief Justice and two other members of the Supreme Court of Georgia agreed with Mr. Jones's theory of the case and wrote a strong dissent.[28]

D. In *Fay* v. *Noia* the defendant was also confronted with a "grisly" choice. In that case a defendant was convicted of murder. Years later, long after his time for appeal had expired, he applied for habeas corpus on the

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[28] In his dissenting opinion, Chief Justice Duckworth said:

"In full recognition of the established rule of law that holds those parties to a criminal conspiracy or enterprise, who commit no overt act, equally guilty with those who commit the overt acts, I am, nevertheless, simply unable to find any basis either in law or common reason for holding this defendant guilty of murder where all the evidence excludes any possibility of conspiracy among the four, who included this defendant and the person who did the killing. They had planned no robbery, theft or other crime, and indeed had no reason to expect to see the deceased before he went to them. Thereafter, this defendant had no dealings, words or feelings with or toward the deceased. Why should he want to harm the deceased? There is positively a complete absence of even a suspicion of any motive. The slayer committed every criminal act that caused the death. He needed no help from this accused other than pushing the car and racing the motor, both of which were done at his command while he held the gun with which he later shot the deceased, who had already been knocked unconscious by the killer. To say that this was not enough to cause a reasonable person to fear that a refusal to obey would endanger his life, is to ignore realities and human nature. No act of his harmed a hair of the deceased. Even if he was cowardly and foolish in obeying the murderer who held a gun, this would not show his guilt of criminal desire or intent. Human life should not be taken by the State with such total lack of evidence of either act or intent as this record shows. Unless he is saved by the clemency of the Pardon and Parole Board, his life will be forfeited for a crime he never committed and had no cause for wanting it committed. If this decision fixes the law, then every person stands in danger of being electrocuted if a murder is committed by someone of his associates even though he had no knowledge that it was going to be done." Whitus v. State, 116 S.E.2d at 207.

ground that he had been convicted on the basis of a coerced confession. The Supreme Court held that the petitioner's failure to appeal in the state court was not a waiver of his rights and did not bar habeas corpus relief. The Court first eliminated the possibility of any express waiver: "A choice made by counsel not participated in by the petitioner does not automatically bar relief." Mr. Justice Brennan, for the majority, then explained why Noia's choice not to appeal was not a matter of trial strategy or a deliberate attempt to by-pass state procedures:

> "Under no reasonable view can the State's version of Noia's reason for not appealing support an inference of deliberate by-passing of the state court system. For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the *grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence.* See, e.g., Palko v. Connecticut, 302 U.S. 319. He declined to play Russian roulette in this fashion. This was a choice by Noia not to appeal, but under the circumstances it cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures."

Recently a commentator has observed the analogy between the defendant's situation in the *Noia* case and the defendant's position in the instant case "in that here he must choose whether to assert his constitutional right with a possibility of forfeiting his chances for an unprejudiced trial, or remain silent and gamble on the outcome of the trial with the possibility of raising the question later if the outcome proves unsatisfactory."

Note, 16 Ala. L. Rev. 117 (1963).[29] The instant case, however, is a stronger case than *Fay* v. *Noia* for habeas corpus relief. Noia could have exercised his right to appeal without suffering any constitutional deprivation. But here, in order for the petitioners to exercise their right to a jury from which Negroes were not excluded, the petitioners had to compromise their right to a fair trial on the merits of their defense.

IV.

We summarize. Taking waiver as the "intentional relinquishment or abandonment of a known right or privilege," the facts show that the petitioners made no "deliberate," meaningful waiver of their objection to systematic exclusion of Negroes from the juries in Mitchell County. Taking "waiver" as a formula standing for the rule that non-assertion of an objection to

[29] The note is on Ex parte Aaron, Ala. S. Ct. 1963, 155 So. 2d 334. On the authority of Seals v. State, 1961, 271 Ala. 622, 126 So. 2d 474, *cert. den'd* 1961, 366 U.S. 954, 81 S. Ct. 1909, 6 L.Ed.2d 1246, the Court held that the defendant, a Negro indicted for the rape of a white woman, had waived the systematic exclusion issue. At arraignment, in answer to a question from the trial judge, the defendant's attorney stated that they did not intend to attack either the grand jury or the petit jury venire because of "the racial make-up of such grand jury or petit jury venire." The note concludes, "Thus, the Alabama court has yet to recognize the principle advanced in the *Noia* case—that even a knowing failure to assert this particular constitutional right does not constitute a waiver, or, more concisely, that there can *be* no waiver at the present time of this constitutional right. . . . Would it not be better to align [Alabama's] concept of waiver with that set out in the *Noia* case, thereby enabling defendants, by coram nobis in state courts, to assert the right for the first time, rather than forcing an unsuccessful defendant into the federal courts on habeas corpus when the obvious result will be a federal decision overturning a decision of our highest state court, with the chafing effect it will undoubtedly have on federal-state relations?" Note, 16 Ala. L. Jour. 117, 123 (1963).

state procedures vitiates the objection, we hold: under *Fay* v. *Noia*, in a federal habeas corpus proceeding the court cannot permit a state ground rule to frustrate the federally guaranteed right to a fair trial before a fairly constituted jury. We do not say that "no waiver can be effective if some adverse consequences might reasonably be expected to follow the exercise of that right."[30] We say that the doctrine of fictitious waiver is unacceptable when the state compels an accused person to choose between an unfairly constituted jury and a prejudiced jury. In short, while giving full effect to the holding of the majority in *Fay* v. *Noia* the Court has attempted to answer the basic question Mr. Justice Harlan asked in his dissenting opinion: "Whether the choice made by the defendant is one that the State could constitutionally require."[31] We hold that the State could not constitutionally require the petitioners to make a guess and a gamble between two evils. This burden, which only Negro defendants bear, violates the requirements of due process and equal protection of the laws guaranteed by the Fourteenth Amendment.

* * *

As in *Goldsby* and *Seals*, the Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari, or otherwise, will be sufficient to afford the State an opportunity to take the necessary steps to reindict and retry the petitioners. Any such reindictment must of course be by a grand jury from which Negroes have not been systematically excluded, and any such retrial

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[30] Fay v. Noia, 1963, 372 U.S. 391, 472 (dissenting opinion).

[31] Ibid.

must be before a jury from which Negroes have not been systematically excluded, or before some court or tribunal so constituted as not to violate the petitioners' constitutional rights. For the guidance of the parties, the Court expresses the present opinion that if petitioners are reindicted and retried and if any question should arise as to the legality or constitutionality of such indictment or trial, that should be decided not upon the present petition but in the regular course by the Courts of the State of Georgia, subject to possible review by the Supreme Court of the United States.

The judgment of the district court is reversed, judgment here rendered in accordance with the holdings of this opinion, and the cause remanded for any further proceedings which may be found necessary or proper.

REVERSED, RENDERED, and REMANDED.

CARSWELL, District Judge, concurring specially:

Sharing fully the Courts' view that there was no meaningful waiver by these appellants of their basic Constitutional right to face trial by jurors selected without systematic racial exclusion, I, therefore, concur in the basic holding of the Court's opinion.

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and CARSWELL, District Judge.

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, judgment here rendered in accordance with the holdings of the opinion; and that this cause be, and it is hereby remanded to the said District Court for any further proceedings which may be found necessary or proper;

It is further ordered and adjudged that the appellee, R. P. Balkcom, Jr., Warden, State Penitentiary, Reidsville, Georgia, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Carswell, District Judge, concurs specially"

June 18, 1964